of $5,000, then a balance of $400 was outstanding and judgment should be entered for the appellant for $400. Otherwise there must be judgment for the appellant in the sum of $5,000 claimed by her. The question therefore before the trial court was one of fact: what was the nature of the monthly payments?

On this issue and on a consideration of the evidence adduced before him, the President Sessions Court came to a definite finding that the $4,600 was paid not towards the repayment of the loan of $5,000 but by way of profits from the commercial venture which the respondent was then undertaking partly with the money borrowed from the appellant's husband. He considered the evidence that the respondent had given the appellant a cheque for $5,000 as security for the loan if not conclusive against, at least disproving, the contention that only a sum of $400 remained due and owing. Accordingly, he gave judgment for the appellant for $5,000.

The learned judge, on appeal, thought this reasoning faulty. He considered it as not unlikely for a security to be given for $5,000 against a debt of $400. As has been observed, if he thought, against the finding of the President Sessions Court, that the appellant had not proved her claim on a balance of probabilities, he should have substituted a judgment for $400 on the admission that this sum remained outstanding from the loan of $5,000. Instead, however, he set aside the judgment of the President Sessions Court and ordered a retrial. He was clearly of the opinion that the evidence led by the respondent was unsatisfactory. Learned counsel for the respondent at the appeal (who did not appear in the Sessions Court) conceded that that was so, but was glad to be given a second chance to prove his client's case.

With respect, it seems to us that the finding of fact by the President Sessions Court is one made by him not only in the setting of the demeanour of the witnesses whom he had the advantage of seeing and hearing but also as a matter of reasonable inference from evidence which was common to both sides. A deposit of a security for $5,000 renewed subsequently after the substantial payments had been made is perhaps more indicative of the fact that the payments were not made towards repayment of the loan, as the President Sessions Court thought and found. Such a finding is clearly one which no appellate court is entitled to overrule.

As Lord Russell of Killowen said in delivering the recent judgment of the Privy Council in *Oh Hiam & Ors.* v. *Tham Kong.*[1]

"...The Federal Court... sought to analyse the Notes of Evidence, arriving at a diametrically opposite view to that taken by the trial judge on which evidence should be accepted. This approach in an appellate court is on general principle very rarely acceptable, as has more than once been said by the Board, notably recently in *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41."

The appeal was accordingly allowed with costs here and in the High Court and the judgment of the President Sessions Court restored.

Appeal allowed.

Solicitors: *Jegathesan & Co.; H.B. Ball.*

ABDUL GHANI BIN JUSOH & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Wan Suleiman, Syed Othman & Ibrahim Manan F.JJ.) February 26 & September 23, 1980]

[Kuala Lumpur — Federal Court Criminal Appeal No. 18 of 1979]

Criminal Law and Procedure — Admissibility of cautioned statements — Statements made in the course of police investigations — Statements unsigned — Statement made to probationary inspector — Whether statements admissible — Criminal Procedure Code (F.M.S. Cap. 6), ss. 112(i), 112(v) and 113.

In this case the appellants had been convicted of offences under section 304 of the Penal Code. The case against the appellants relied largely on the admissibility of the cautioned statements made by them. The statements were unsigned and the statement of the first appellant was made to a Probationary Inspector. The learned trial judge admitted the statements in evidence. The appellants appealed.

Held, allowing the appeals: (1) as the statements were not signed or thumbprinted, and since no adequate reason was advanced for the failure to obtain the signature or thumbprint of the appellants, the statements were inadmissible in evidence;

(2) the statement recorded by the Probationary Inspector was not a statement recorded in accordance with section 113 of the Criminal Procedure Code and was therefore inadmissible.

Cases referred to:-

(1) *Lim Kim Chuan* v. *Public Prosecutor* [1948] M.L.J. 117.

(2) *Gartside* v. *I.R.C.* [1968] A.C. 553, 612.

(3) *Young & Co.* v. *Mayor etc. of Leamington* (1883) 8 App. Cas. 517, 526.

(4) *Public Prosecutor* v. *Ng Goh Weng & Anor.* [1979] 1 M.L.J. 127.

FEDERAL COURT.

T. Mura Raju for the first appellant.

Mahinder Singh (*P. Selvam* with him) for the second appellant.

T.S. Sambathamurthi (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J.: We allowed the appeals against conviction and sentence by both the appellants and acquitted and discharged both of them some time ago at which time we promised to give our written reasons for so doing, being acutely aware that the issues of law raised in the course of this appeal are of great public interest.

The arguments in this appeal were founded on two main grounds. Firstly learned counsel for the appellants complained that both the statements alleged to have been made by both appellants were unsigned and therefore not admissible in evidence. Secondly that alleged to have been made by the 1st appellant had the additional defect of having been recorded by a Probationary Inspector contrary to statutory requirement, and for that reason as well become inadmissible.

The appellants were charged with an offence punishable under section 302 of the Penal Code read together with section 34 of the Penal Code.

They were found guilty of an offence under section 304 of the Penal Code and were both sentenced to 10 years' imprisonment.

Briefly the case for the prosecution is that the

two appellants were passionately in love with one another but unfortunately Minah the second appellant was married to the deceased. The prosecution alleged that the two had conspired to kill the deceased. They lured the deceased to Kg. Damai and there under cover of darkness killed him.

The case against both the appellants relied largely on the admissibility of the cautioned statements given by them. The learned trial judge found that despite the appellants' protestations to the contrary, the statements had been voluntarily made and therefore admitted them in evidence.

Second appellant's statement as well as her defence were, unlike the first appellant's cautioned statement, a total denial of guilt.

Before us it was urged that even assuming that both the statements were otherwise voluntary, they are inadmissible because neither had been signed by the appellant alleged to have made it.

I must confess that section 112 as it now stands and the amended section 113 present difficulties of interpretation. In the first place there appears to be inconsistency between section 112(i) and section 112(v) both of which subsections are set out hereunder:

"112(i) — A police officer making a police investigation *under this chapter* may examine orally any person supposed to be acquainted with the facts and circumstances of the case and *shall reduce into writing* any statement made by the person so examined.

112(v) — A statement made by any person under this section whether or not a caution has been administered to him under section 113(1) shall, *whenever possible,* be taken down in writing and *signed by the person making it or affixed with his thumb print* as the case may be, after it has been read to him ... any corrections he may wish."

The first point which needs careful consideration is whether a cautioned statement recorded under section 113 is at the same time a statement recorded under section 112.

Section 112(i) refers to police investigations under this Chapter i.e. Chapter XIII which bears the title "Information to the Police and their powers to investigate" and section 112(v) "A statement made by any person under this section ..." which must necessarily mean a statement made to a police officer making a police investigation under the aforementioned Chapter XIII.

Again confining myself to the facts of the instant appeal, it cannot be gainsaid by the prosecution that both appellants had made their respective cautioned statements during the course of police investigations.

That attributed to the 1st appellant, Abdul Ghani bin Jusoh was made on January 13, 1977 to Insp. Razak bin Basri (at the time of recording, a Probationary Inspector). First appellant was then under arrest, and clearly police investigation under Chapter XIII was already well in progress. In the Inspector's own words — "I told the first accused that I wanted to take his statement. I asked him whether he wished to say anything. He said he wanted to tell me the whole story.... I cautioned him."

The cautioned statement alleged to have been made by second appellant to Ketua/Insp. Shaikh Mohd Ariffin was also made on the same date January 13, 1977.

Police investigations had in law started after the reports by the Ketua Kampong, the first prosecution witness, made in the wee hours of the morning of January 12, 1977.

I would with respect adopt what Callow J. said in *Lim Kim Chuan* v. *Public Prosecutor,*[1] "Once the suspicion of a police officer has been aroused to such an extent as to cause him to proceed to any action, then investigation has been commenced. If the fact that investigation has commenced and is being conducted in some form or other is the cause or occasion of a statement being made, or if the statement results or proceeds from any act done in investigation, then the statement is made in the course of investigation."

I fail to see how statements recorded from persons closely connected with the deceased the day after the fatal assault had been reported to them could be anything but statements made in the course of police investigations under Chapter XIII and therefore are made under section 112.

Having satisfied myself that a statement made under section 112(v) is indeed a statement made in the course of police investigations made under Chapter XIII of the Criminal Procedure Code, and in particular that the two statements in the appeal came within this category of statements, I must next consider the effect of the clause in section 112(v) "shall, whenever possible, be taken down in writing, and signed by the person making it ... as the case may be", bearing in mind that section 112(i) peremptorily requires the police officer making the investigations to "reduce into writing" any statement made by the person under investigation.

In *Gartside* v. *I.R.C.*[2] Lord Reid remarked, "It is always proper to construe an ambiguous word or phrase in the light of the mischief which the provision is obviously designed to prevent and in the light of the reasonableness of the consequences which follow from giving it a particular construction."

Lord Blackburn, in the much earlier decision in *Young & Co.* v. *Mayor etc. of Leamington*[3] said that courts "ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law."

From this assumption arose the practice of the courts of examining pre-existing law in order to clarify the meaning of Statutes.

Act A324 (which came into effect from January 10, 1976) brought about a radical change to section 113, giving the police in this country the same powers to record statements, which may be admissible in evidence, that the police in England have had for many years, but with the amendment came certain safeguards.

A brief reference to the previous state of the law will make it clear why in its amended form the Legislature had seen fit to hedge this new power given to the police with these safeguards.

Section 113(i) (before its amendment by Act A324) reads:

"No statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be signed by the person making it, nor shall such statement, save as herein provided, be used as evidence."

Thus statements made to the police were then restricted in the use to which they can be put, and that was to contradict the statement of such witness in the manner provided by the Evidence Ordinance, 1950 or under the old section 113(iv) where he was charged with any offence in relation to the making or the contents of such statement. Under the old section 113(ii), the use of such statements for the purpose of impeaching the credit of witnesses, specifically excludes the accused person.

The explanatory statement to the Bill which became Act A324 has this to say of the new section 113:—

"The substitute section proposes a major change. Hitherto no statement made by an accused person to a police officer in the course of a police investigation has been admissible in evidence at the trial. But the protection of the accused from self-incrimination has been much eroded by subsequent laws, and now in trials for nearly a hundred different offences under thirteen laws the cautioned statement procedure applies. The object of the proposed amendment is to extend the cautioned statement procedure to all criminal investigation and trials."

Having decided to make such a major change in section 113, the addition of a new subsection 112(v) some nine months later (by Act A365 w.e.f. October 29, 1976) appears to be a sort of legislative afterthought, and the mischief this provision is obviously designed to prevent is the concocting or "improving" of statements by recorders thereof. Affixing the maker's signature (or thumb impression) is the universal mode of signifying its authenticity and it would be reasonable to expect refusal by the person examined to so authenticate a statement which does not accord to what he had told the police.

It will be proper to assume that Parliament is aware of the state of the law prior to these amendments including the fact that section 112(i) had prior to the addition of section 112(v) already made it mandatory for the recording officer to "reduce into writing any statement" made by the person examined. It therefore follows that the words "whenever possible" in section 112(v) can only refer to the act of obtaining the signature or thumb impression of the person examined, and not to the clause "to be taken down in writing", an act which has already been prescribed by the earlier sub-section. It is not too difficult to contemplate exceptional circumstances where a court may, on being satisfied as to the reason for failure to obtain these marks of authentication, yet allow such statement to be used for the purpose to which section 112 and section 113 allow them to be used.

Since no adequate reason and indeed no reason whatsoever has been advanced for the failure to obtain the signature (or thumb print) of the accused on their respective statement, I hold that both are not admissible in evidence.

Another point taken up on appeal was that the statement of 1st appellant was recorded by a probationary Inspector. In the Police Act, 1967 itself a "probationary Inspector" ranks below "Inspector". (See First Schedule).

Further, my attention has been drawn to the decision of this court in *Public Prosecutor* v. *Ng Goh Weng & Anor.*,[4] where at page 128 the learned Lord President said:

"However, not all cautioned statements are admissible. A cautioned statement is admissible if and only if it satisfies the conditions set out in section 113. In particular we mention two conditions: that it should be made to a police officer of or above the rank of Inspector, and that it was made voluntarily. If clearly the statement was made to an officer below the rank of Inspector, then the duty of the committing Magistrate is easy — he simply rejects it."

Here again having in mind the need to strike a balance between the necessity of entrusting our police with powers of recording statements admissible in evidence in the interest of bringing wrongdoers speedily to book, and the equally important need to ensure that such powers are not misused, the Legislature saw fit to insert a safeguard by requiring that the recording of such statements be confined to experienced officers only. That, it seems to me, is why section 113 gives the power specifically to officers of the rank of Inspector and above, officers who are or should be familiar with the intricacies of police work and with the niceties of penal law, criminal procedure and evidence.

I would therefore hold that any statement recorded by someone who is a probationary Inspector is a statement not recorded in accordance with section 113, and in consequence inadmissible.

Having heard the arguments advanced on behalf of the appellants, Mr. Sambanthamurthi for the Public Prosecutor with great candour admitted that he had no answer to these serious defects in the two statements produced in evidence in the court below. Bereft of the cautioned statements the prosecution case would be very feeble indeed, and I am in grave doubt whether any jury would in the absence of these weighty items of evidence have convicted either appellant.

Accordingly I held that both appellants should be acquitted and discharged.

Syed Othman F.J.: The two appellants were charged with murder. The jury returned on both a 5-2 guilty verdict of culpable homicide not amounting to murder under section 304 Penal Code, and they were each sentenced to 10 years' imprisonment.

After hearing the arguments in this appeal we were agreed, as indicated by my learned colleague Wan Suleiman F.J. in his judgment, that the appeal should be allowed. Our reasons indicated very briefly then were that in the circumstances of the case the cautioned statements said to have been made by the appellants should not have been admitted in evidence and that if not for the cautioned statements it was doubtful if any reasonable jury would have returned a verdict of guilty on the remaining evidence.

I now give my reasons more fully.

From the record of the High Court in the trial within trial as regards the admissibility of the second appellant's statement, which was dealt with first, the chief inspector who recorded her statement said that he did not ask her to sign the statement which he had

written down as he thought it was unnecessary. After this trial within trial and before the trial within trial on the cautioned statement of the first appellant, there appeared to be some arguments as to the effect of sections 112 and 113 of Criminal Procedure Code (C.P.C.) and the learned trial judge ruled that the signature of the accused person to a cautioned statement was not required, as the statement was made under section 113 C.P.C. Though the learned trial judge did not say so, I believe that the reason is that he agreed with the submission of Encik Harany, the Deputy Public Prosecutor, which was to the effect that section 113 C.P.C., unlike section 112, does not contain any direction requiring the police officer to reduce into writing the statement made by the accused person. (See page 171 of the record.)

In the trial within trial as regards the first appellant's cautioned statement, the evidence shows that after recording the statement, the recording officer, a probationary inspector, said in the evidence that after he had read over the statement which he had typed, he (the probationary inspector) signed it.

In considering the question whether a cautioned statement under section 113 C.P.C. which has been reduced into writing by the recording officer should be signed by an accused person, it is also necessary to consider section 112 C.P.C. The former contains no direction as to the taking down of a statement while the latter contains specific direction.

In my view, section 112(v) C.P.C. is not intended to apply to a statement by the accused person only. It also applies to statements by witnesses. A statement by any person where caution has not been administered may be that of a witness or an accused person. A statement by any person where caution under section 113(1) C.P.C. has been administered can only be that of an accused person. In examining any person section 112(i) C.P.C. requires the police officer making a police investigation (investigating officer) to reduce into writing any statement made by the person examined, whether he be a witness or an accused person. But section 112(v) C.P.C. seems to reduce this requirement. At first reading, the requirement seems to be that the investigating officer need only take down in writing the statement, whenever possible, and he need only get the maker of the statement to sign or thumbprint it, also whenever possible. Under present day conditions one finds it is difficult to imagine the occasion where it will not be possible for the police officer to take down a statement in writing. Anyway, so far as signature or thumbprinting is concerned, the implication of the subsection is that if it is not possible to get it from the maker of the statement, satisfactory evidence must be adduced as to the reasons before the statement can be accepted as evidence for whatever purpose at a trial; otherwise it is not admissible, as a specific requirement of law has not been complied with. A signature or thumbprint on the statement is an authentication that the maker made it. It is also, I believe, a safeguard against any allegation that the recording officer has built up the statement.

In the present case, even if the police officer, who recorded the statements may be regarded as exercising the powers of investigation, on their evidence they have not complied with the requirements of section 112 C.P.C.

Section 113(1) C.P.C. specifically relates to a cautioned statement by an accused person, who is described there as the person charged with an offence. It need not necessarily be made before an investigating officer. But the main qualification in this provision for a cautioned statement to be admitted in evidence at the accused person's trial is that it must be made (citing from the section) "by that person to or in the hearing of any police officer of or above the rank of Inspector . . . ." So far as writing is concerned it seems to envisage that in the first instance the writing is made by the accused person himself. In this case then, I am of the view, signature would not be necessary, as the handwriting by the accused person is sufficient authentication. But where the statement is not written by the accused person but reduced into writing by the police officer, the accused person must sign or thumbprint it, as in the ordinary course of human conduct this is the only authentication that he made the statement. Such signature or thumbprint, on the fact of it, is also evidence of voluntariness. In the ordinary course of human conduct if a person is said to have freely made a statement which is written by someone else, there is all the reason that the person will affix his signature or thumbprint as a mark of verification that he made it.

In the case here the two statements of the accused persons were not signed. The recording officers merely gave evidence as indicated above. The statements contained long narrative of events. In each case in the trial within trial the appellants denied every material part of the statements. The absence of signature or thumbprint on the statements as recorded by the police officers, in the circumstances, does not support the prosecution's contention that the appellants made them or that they voluntarily made them.

I also agree with the view that the first appellant's statement is also inadmissible on the ground that it was made to a probationary inspector, an officer who in rank is below that which is prescribed by law.

Ibrahim Manan F.J.: I have read the judgment in draft of Wan Suleiman F.J. and agree with it. I would, however, like to say a few words on the two cautioned statements.

Though the caution was administered under section 113(1) of the C.P.C. the two statements were made "in the course of a police investigation" and the words "whether or not a caution had been administered to him under section 113(1)", appearing in section 112(v) clearly show that the two said sections must in the circumstances of this case be read together. Since the two cautioned statements were not signed or thumb-printed they were not admissible in evidence.

Appeals allowed.

Solicitors: *S. Sivasubramaniam; Mahinder & Co.*